



**Attorney General
Betty D. Montgomery**

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September 18, 1997

Via Overnight Mail

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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Re: *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers, CC Docket No. 94-129.*

Dear Mr. Caton:

Enclosed please find and accept the original and twelve copies, and the MS DOS WP 5.1 ROM diskette, of the **Late Filed Comments of the Public Utilities Commission of Ohio**, in the above-referenced matter. The PUCO routinely reviews submissions to the FCC at its regularly scheduled meetings and was unable to complete this review by the original filing date. These late filed comments will not prejudice any party, and will permit the FCC to have a more complete record on which to decide issues. Please return a time-stamped copy to me in the enclosed stamped, self-addressed envelope.

Thank you for your assistance in this matter.

Respectfully submitted,

Betty D. Montgomery
Attorney General of Ohio

A handwritten signature in cursive script, reading "Johnlander Jackson-Forbes".

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JJF/kja
Enclosure

cc: Cathy Seidel, Common Carrier Bureau
International Transcription Services, Inc.
Formal Complaints Branch, Enforcement Division

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
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Implementation of the Subscriber)
Carrier Selection Changes Provisions)
of the Telecommunications Act of 1996)
)
Policies and Rules Concerning)
Unauthorized Changes of Consumer's)
Long Distance Carriers)

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LATE FILED COMMENTS OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

INTRODUCTION AND BACKGROUND

The Public Utilities Commission of Ohio (PUCO) hereby submits its comments pursuant to the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking (NPRM) in CC Docket No. 94-129 (In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions the Telecommunications Act of 1996 - Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers. The FCC's NPRM in this investigation proposes modifications to its existing rules in order to implement section 258 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act).

The 1996 Act makes it unlawful for any telecommunications carrier to submit or execute a change in a subscriber's carrier selection, except in accordance with the FCC's verification procedures, and provides that any carrier that violates these procedures and collects charges for telecommunications service from a subscriber after such violation shall be liable to the subscriber's properly authorized carrier for all charges collected. Initial comments in this proceeding are due at the FCC on September 15, 1997.

DISCUSSION

The Public Utilities Commission of Ohio ("PUCO" or "Ohio Commission") commends the Federal Communications Commission (FCC) for adopting new rules and proposing additional rules, governing the switching of subscribers' telecommunications providers for both local and toll service. The new rules will provide a new level of protection to consumers from the practice of unauthorized switching of telecommunications carriers, otherwise known as "slamming". While in the past the practice of slamming was confined to interexchange carriers, the threat of slamming now exists in the local market and the FCC has recognized this threat in this Further Notice of Proposed Rulemaking (NPRM).

The PUCO has already established slamming guidelines applicable to local carriers in Case No. 95-845-TP-COI, In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, June 12, and November 7, 1996 and February 20, 1997 (Case No. 95-845). These guidelines have essentially been mirrored and applied to both interexchange carriers (IXCs) as well as local exchange carriers (LECs) in Ohio in Case No. 96-1175-TP-ORD, In the Matter of the Amendment of the Minimum Telephone Service Standards as Set Forth in Chapter 4901:1-5 of the Ohio Administrative Code, June 26, and September 11, 1997. The Ohio Commission adopted the FCC's existing slamming rules in these two proceedings with some minor enhancements. In addition, the Commission adopted the new protections as provided for in Section 258 of the Act.

Section 258 of the Act makes it unlawful for any telecommunications carrier to "submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." The section further

provides that any carrier that violates the verification procedures prescribed by the FCC shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber after such violation.

During the last five years, the number of slamming complaints received by the PUCO has increased exponentially. In 1992 the PUCO received 215 slamming complaints. During the twelve-month period ending June 30, 1997, the PUCO received nearly 3,500 slamming complaints. Due to the number and complex nature of these complaints the PUCO recognizes that additional safeguards are needed to protect consumers against slamming.

The PUCO has added an additional protection for consumers to protect them from unauthorized switching of their local or long distance carriers in Case No. 95-845. While existing rules mandate that in the event a consumer alleges that he/she has been slammed, the burden is on the carrier to prove that the switch was legitimate, new PUCO rules mandate that a carrier can prove that the switch was legitimate only by producing a signed letter of authorization (LOA) authorizing the switch. In the absence of a LOA, it will be presumed that the consumer was slammed. The LOA does not have to be acquired prior to effectuating the switch but must be produced upon a consumer's complaint that he/she was slammed. If a carrier chooses enrollment options such as electronic or third-party verification, the PUCO requires the carrier to send, within three days, new subscribers information packets which include an LOA and postpaid envelope. While the PUCO has added additional remedies for the prevention of slamming, we agree with the FCC that it is necessary to develop further consumer safeguards at the federal level.

Application of the Verification Rules to All Telecommunications Carriers

The FCC notes that the Act does not define "submitting" or "executing" carriers. Under current FCC verification procedures, the submitting carrier is the

IXC that requests, on behalf of the consumer, that a PIC change be made, and the executing carrier is the LEC that implements the PIC change. Under the FCC's proposed rules, submitting and executing carriers may be IXCs or LECs or both. For purposes of the proposed verification procedures, the FCC tentatively concludes that a submitting carrier is any carrier that requests that a consumer's telecommunications carrier be changed, and an executing carrier is any carrier that implements such a request. The FCC seeks comments on these definitions. NPRM at 13. The FCC also concludes that, with the modifications discussed elsewhere in the FNPRM, the verification procedures are sufficient in the existing rules as applicable to "submitting" telecommunications carriers under the Act.

The FCC believes that Section 258 does not require that an executing telecommunications carrier duplicate the Preferred Carrier (PC)-change verification efforts of the submitting telecommunications carrier. (A preferred carrier change differs from a PIC change in that a preferred carrier change includes both local and toll providers.) The FCC posits that requiring independent verification by an executing carrier in all instances could have the effect of doubling the transaction costs associated with the selection of a primary carrier. Furthermore, the FCC states that the submitting carrier's compliance with FCC rules should facilitate timely and accurate execution of a PC-change. The FCC seeks comment on this tentative conclusion. NPRM at 14.

Additionally, the FCC requests that commenters address whether incumbent LECs should be subject to different requirements and prohibitions because of any advantages that their incumbent status provides in comparison to carriers that are seeking to enter the local exchange markets. Under the current approach, an incumbent LEC would be responsible for executing PC-change requests for local service from competing carriers, which will result in a loss of business for the

incumbent LEC. To avoid losing local customers, the incumbent LEC could potentially delay or refuse to process PC-change requests from local exchange service competitors. A related concern is that a PC-change may lead a carrier to engage in conduct that blurs the distinction between its role as executing carrier and its objectives as a marketplace competitor. The FCC seeks comment on whether such a letter would violate its verification rule prohibiting carriers from combining LOAs with inducements of any kind on the same document, and on whether such a practice would be otherwise inconsistent with the Act's consumer protection and pro-competition goals. The FCC also seeks comment on whether LECs, serving as both submitting carrier and executing carrier for changes in telecommunications service and offering interexchange and local exchange service or just local exchange service, have an enhanced ability or incentive to make unauthorized PC-changes on their own behalf without detection, and thus should be limited to verification by an independent third-party. NPRM at 15.

The 1996 Act expanded the authority of the FCC to address slamming by all carriers that "submit" or "execute" preferred carrier (PC) changes. The FCC seeks comment on whether current FCC verification rules are sufficient in light of this expansion to all carriers. The FCC also seeks comment on whether its rules would have consumer protection and pro-competition effects in the local market and whether its rules can or should be applied to the local market in whole or in part. NPRM at 11.

The PUCO believes that current and proposed FCC slamming rules are adequate to the degree that such rules apply to all carriers. The PUCO also believes that such rules should be applied by the FCC in totality to the local market and agrees in principle with the proposed definition of executing and submitting carriers. The PUCO concurs with the FCC that compliance with the FCC's

verification rules by the submitting carrier should facilitate timely and accurate execution of a PC-change. Furthermore, the PUCO believes that incumbent LECs need not be subjected to third-party verification of PC changes even when the LEC is both the submitting and executing carrier. The FCC's current and proposed rules are adequate to address slamming concerns for local and long distance PC-changes with several minor modifications. One such modification, adopted in Ohio (noted above), would require that any carrier which is accused of slamming by a subscriber be required to produce an LOA signed by the subscriber to prove the validity of any PIC-change. The LOA need not be obtained prior to the change of a subscriber's PC so long as one of the FCC-approved methods of verification is followed prior to initiating the change of carrier.

Viability of the "Welcome Package" Verification Option

The FCC's current rules require IXCs to utilize one of four confirmation procedures before submitting their PIC-change orders generated by telemarketing. The fourth confirmation procedure requires the IXC to send each new customer an information package, including, inter alia, a prepaid postcard, which the customer can use to deny, cancel, or confirm the change order. This option is sometimes referred to as the "Welcome Package." The current FCC rule provides that the package must contain - a clear statement that if the customer does not return the postcard, the customer's long distance service will be switched within 14 days after the date the information package was mailed to [name of soliciting carrier]. NPRM at 16.

The FCC has stated that it is "inclined" to agree with The National Association of Attorneys General (NAAG) that the Welcome Package option could be used in the same manner as a negative-option LOA. Accordingly, the FCC

tentatively concluded that the "Welcome Package" verification option should be eliminated, and seeks comment on this tentative conclusion. NPRM at 18.

The PUCO concurs with NAAG that the FCC should eliminate the negative-option aspect of the "Welcome Package". There is no viable method of determining if the oral agreement given by a consumer during a telemarketing call is legitimate. The PUCO is opposed to any negative-option PIC-change procedures.

Application of the Verification Rules to In-Bound Calls

The FCC concluded in the Report and Order in CC Docket 94-129, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, (1995 Report and Order) that verification procedures should be extended to consumer-initiated "in-bound" calls. The FCC believes that it serves the public interest to offer consumers who place calls to carrier sales or marketing centers the same protection as those consumers who are contacted by carriers. Moreover, with the section 258 extension of slamming restrictions to all telecommunications carriers, and the potential for a single carrier to offer local exchange and interexchange service, it is likely that problems with in-bound calling will be of even greater significance. Without any requirement for verification of in-bound calls, carriers may be motivated to use the call to switch a consumer to other telecommunications services they provide (i.e., local or long distance service). The FCC tentatively concludes that verification of in-bound calls is necessary to deter slamming and seek further comment. NPRM at 19.

The FCC also encourages commenters to consider whether, without in-bound verification requirements, carriers' contests and sweepstakes advertisements could potentially be used to induce consumers to call the carriers' in-bound marketing centers and possibly switch the consumer to another carrier, either through deceptive practices or through the use of electronic information now widely

available, such as ANI. With in-bound telemarketing, the consumer and the Commission might not have any record of the transaction that resulted in the carrier change; the lack of a record would make it difficult to ascertain the facts involved in any in-bound slamming dispute. The FCC also encourages commenters to consider the case of bundled service offerings. Moreover, entities would be able to generate in-bound calls to marketing centers that accept service orders for affiliate carriers, thereby facilitating slamming by carriers that are not directly contacted by the consumer. NPRM at 20.

The PUCO agrees with the FCC that verification of in-bound telemarketing calls is necessary to deter further the practice of slamming. The PUCO recommends that FCC-approved verification procedures be followed for any PIC-change which results from an in-bound call. Along with this recommendation, the Ohio Commission would recognize that in the event of a dispute, the LOA be the only accepted evidence in support of the switch.

Verification and Preferred Carrier Freezes

The FCC also seeks comment on whether its PIC-change verification procedures should be extended to PC-freeze solicitations. Although neither the Act, nor the FCC's rules and orders specifically address carrier PC-freeze solicitation practices, concerns about PC-freeze solicitations have been raised with the FCC. The FCC seeks comment on how best to reconcile the competing strains of providing adequate consumer protection and the need to facilitate competition among carriers. NPRM at 22.

The FCC posits that a carrier that mails to a subscriber a package that includes information and/or promotional materials regarding PC freezes along with a "response form" that the subscriber is asked to sign and return to the carrier to effect a freeze could involve marketing solicitations designed to enhance the competitive

position of the incumbent carrier in a manner that may be at odds with the requirements of the 1996 Act and the Commission's rules and orders. The FCC is also concerned about anti-competitive behavior relative to a LEC's imposition of terms and conditions for processing PC-freeze requests of non-affiliated IXC's different from those required of affiliated IXC's. NPRM at 23.

The Ohio Commission recently confronted the issue of PC freezes in its Opinion and Order in Case No. 96-142-TP-CSS, In the Matter of the Complaint of Sprint Communications Company, L.P. v. Ameritech Ohio, September 11, 1997. In this complaint, Sprint alleged, amongst other things, that Ameritech's slamming protection program was unjust and unreasonable and alleged that Ameritech's slamming protection program provides Ameritech with an undue or unreasonable preference or advantage in violation of Section 4905.35, Ohio Revised Code (ORC). Section 4905.35, ORC states that "[n]o public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage."

The Ohio Commission weighed the obvious benefits of consumer protection afforded by Ameritech's Prohibit PIC Change (PPC) program versus the potential anti-competitive effects such an offering could have on the development of a full and effective competitive market. The PUCO believes the decision reached in this case serves as a good model for providing the appropriate balance in other PPC programs, as they are developed, both in Ohio and nationally. In the Opinion and Order in this case, the Ohio Commission required Ameritech to:

- (1) work with other carriers which want to offer their own interLATA, intraLATA, and local slamming protection programs to their customers (when Ameritech is the carrier that controls the switch);

- (2) unbundle its PPC so that customers can request the protection for any combination of interLATA, intraLATA, and local services;
- (3) offer PPC in the local and intraLATA long distance markets only when competition is actually a reality;
- (4) include in customers' bills information that PPC is in effect and to which service(s) PPC applies so customers and competing carriers will have a simple means by which to confirm whether customers actually have the protection;
- (5) refrain from trying to win back a customer's account during the process of changing a customer's carrier selection to another carrier or refrain from providing such information to its marketing staff or affiliate;
- (6) allow conference calls, during its normal business hours, among a customer, a carrier, and Ameritech in order to effectuate a carrier change for a customer who has Ameritech's PPC, as long as the customer consents. Ameritech should not alter or modify the manner in which it handles the conference calls vis-à-vis the carrier involved;
- (7) not use information that it obtains as the "gatekeeper" (i.e., which customers have PPC or which customers have requested a carrier change) for purposes of marketing its services or an affiliate's services; and
- (8) implement the means necessary to comply with the above directives within 120 days from the date of the Opinion and Order.

Additionally, the Ohio Commission ruled that Ameritech may offer PPC in the local service market, on an exchange level basis, at the time the first local service competitor has completed a commercial call in that exchange and for intraLATA services with the advent of intraLATA it presubscription. In Ohio, the development of competitive local and intraLATA telecommunications markets are

at different stages. The PUCO believes its Order in the above case attained the proper balance between consumer protection and the need to protect fledgling competition and respectfully suggest that the FCC consider the approach adopted in Ohio. (See Attachment 1)

We do not believe that it is in the best interests of consumers to make it more difficult for customers signing up for PC-freeze by requiring PIC-change verification procedures. The Ohio Commission also believes that, for the most part, consumers who are inclined to avail themselves of PC-freeze protections will be willing to take the time to "unfreeze" their account to make a change in carriers. After all, that is what the customer is agreeing to do when he/she selects a PC-freeze. We further believe that when a consumer, who has a freeze on his/her account, switches LECs that he/she must affirmatively request that the PC-freeze be reinstituted if the new carrier has a PC-freeze program.

Liability of Subscribers to Carriers

When a subscriber pays charges assessed by an unauthorized carrier, Section 258(b) of the Act makes it clear that the unauthorized carrier is not entitled to keep such revenue gained through slamming. The Act does not, however, address whether subscribers must pay any unpaid charges assessed by an unauthorized carrier to the properly authorized carrier or whether charges collected from the unauthorized carrier should be returned to the subscriber who has been slammed. NPRM at 25.

NAAG, urges the FCC to absolve slammed consumers of all liability for the toll charges assessed by unauthorized IXCs, arguing that "to reward the wrongdoer by allowing it to receive any benefit from its wrongful actions is contrary to long established equitable principles and would encourage, rather than deter further slamming." The FCC states that section 258(b) of the 1996 Act, however, appears to

mitigate those concerns by ensuring that the unauthorized carrier is liable to the properly authorized carrier for all charges it collects from the subscriber for service rendered by that unauthorized carrier. NPRM at 26.

The FCC seeks comment on whether slammed consumers should have the option of refusing to pay charges assessed by an unauthorized carrier. The FCC recognizes that if subscribers are absolved of all liability for charges assessed after being slammed, as NAAG proposes, the properly authorized carrier would be deprived of foregone revenue and there may be an incentive for subscribers to delay reporting that they have been slammed. The FCC also recognizes the potential for subscribers to fraudulently claim that they have been slammed to avoid payment for telecommunications service that they may both have requested and received. Therefore, the FCC also invites comment on whether the FCC should limit the time during which a subscriber would not be liable for charges, and seek recommendations regarding what that time should be. NPRM at 27.

The FCC proposes to amend their rules to provide in Section 64.1160(b) that "[a]ny telecommunications carrier that violates [the Commission's verification procedures] and that collects charges for telecommunications service from a subscriber shall be liable to the subscriber's properly authorized carrier in an amount equal to all charges paid by such subscriber after such violation. This proposal mirrors Section 258(b) of the Act by requiring that a carrier in violation of the FCC's verification procedures remit to the properly authorized carrier all charges paid from the time the slam occurred. The FCC seeks comment on this proposed rule and on whether the unauthorized carrier should also be liable to the properly authorized carrier for expenses incurred to collect such charges. NPRM at 28.

The Ohio Commission has mandated in Cases 95-845-TP-COI and 96-1175-TP-ORD that any LEC or IXC that violates the PUCO's verification procedures and

collects charges from a subscriber shall re-rate the subscriber's calls and be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by the subscriber after such violation.

Liability of Carriers to Subscribers

While Section 258(b) addresses the liability of the unauthorized carrier to the properly authorized carrier, it does not specifically address the liability of either carrier to the subscriber. The FCC seeks comment on the duties and obligations of both the unauthorized carrier and the properly authorized carrier with regard to making slammed subscribers whole and what steps should be taken to "make whole" the subscriber victimized by an unauthorized PC change. Commenters should address specifically whether, in the event that a subscriber pays charges assessed by an unauthorized carrier (perhaps because the subscriber is unaware that he or she was slammed), a properly authorized carrier collecting charges paid by the subscriber to the unauthorized carrier, must then reimburse the slammed subscriber. NPRM at 29.

The FCC also seeks comment on what types of products and services offered by telecommunications carriers service-related benefits should be restored to slammed subscribers. The FCC proposes that the unauthorized carrier remit to the properly authorized carrier an amount equal to the value of such premiums, as reasonably determined by the properly authorized carrier. Under the FCC's proposal, upon receiving the value of such premiums from the unauthorized carrier, the properly authorized carrier must then provide or restore to the subscriber any premiums to which the subscriber would have been entitled if the subscriber had not been slammed. The FCC seeks comment on its proposed rule on this aspect of its "make whole" approach. The FCC also seeks comment on whether

carriers should be required to restore premiums to subscribers who have not paid charges assessed by an unauthorized carrier. NPRM at 30.

The Ohio Commission believes, consistent with existing FCC rules, charges for all calls made with the unauthorized carrier, beyond the first billing cycle, should be re-rated by such carrier, at the rates charged by the authorized carrier. Additionally, any PIC-change charges should be refunded to the consumer by the unauthorized carrier.

The PUCO, while sensitive to the issue of lost premiums and travel bonuses, believes that determining the value of any lost premiums or bonuses would be an administrative impossibility especially since neither the FCC nor the PUCO has jurisdiction over the other entities involved (i.e., airlines). Therefore, the Ohio Commission again refers to its rules mentioned above under "Liability of Subscribers to Carriers".

CONCLUSION

In closing, the PUCO wishes to thank the FCC for the opportunity to file comments in this docket.

Respectfully submitted,

Public Utilities Commission of Ohio

By its Attorneys:

Betty Montgomery
Attorney General of Ohio
Duane Luckey, Section Chief

A handwritten signature in cursive script, reading "Johnlander Jackson-Forbes", written over a horizontal line.

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Dated: September 18, 1997